



## C-10 The Legal Issues

# Will C-10's Grant of Discretion to the CRTC Ensure Implementation of Canada's Broadcasting Policy?

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# About the CCSA

The Canadian Communication Systems Alliance (CCSA) is a buying group and the advocacy voice for more than 100 independent providers of bundled internet, TV & telephone services which serve Canadian communities generally outside urban markets, from coast to coast to coast.

For more information, visit <http://ccsaonline.ca>.

# Discretion

“The right to choose what should be done  
in a particular situation”

In a complex modern state, elected representatives are not capable of passing laws to govern every situation. Therefore, provincial and federal governments delegate many of their law-making powers, as well as the power to administer and implement the laws, to administrative agencies.

# C-10's "Grant of Discretion"

CRTC ↓ Cabinet ↑

# CRTC's Discretion

s. 5(1): CRTC is to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in s. 3(1), with regard to the regulatory policy set out in s. 5(2).

- CRTC's "right to choose":
  - What is "broadcasting" (as defined)?
  - How to regulate it? s. 5(2) regulatory policy
  - Through what means?
    - licensing; conditions; regulations
  - To accomplish what? S. 3(1) broadcasting policy

# What is “Broadcasting”?

- C-10 restricts CRTC’s discretion to define
- s. 2(1) Definition
  - Clarifies it includes what CRTC has already included
    - VOD
    - encrypted transmission
    - “New Media” (now defined as “online undertakings”)
  - Excludes
    - s. 2(2.1): social media posters
    - s. 2(2.2): ancillary transmissions and those by schools or part of the operations of a performing arts venue

# How to Regulate?

## Current s. 5(2)

The Canadian broadcasting system should be regulated and supervised *in a flexible manner*, that...

- “*takes into account*”: different characteristics of French and English broadcasting and regional needs and concerns
- “*is readily adaptable*” to scientific and technological change
- “*facilitates*” provision of broadcasting/programs
- “*does not inhibit*” the development of information technologies
- “*is sensitive*” to the administrative burden

= discretion, but an exhaustive list

# How to Regulate

## Bill C-10 s. 5(2)

Reinforces what CRTC already “takes into account” or “facilitates” (albeit to varying degrees)

- the production and provision of programs in English, French, Indigenous languages; OLMC-produced; accessible
- size and diversity of undertakings, impact on creation/the production industry
- + basket clause s. 5(2)(a.1): “and any other characteristic that may be relevant in the circumstances”



# How to Regulate

## Bill C-10 s. 5(2)

But also new limits on CRTC's discretion:

5(2)(a.2): “requires” those that can't make at least predominant use of Canadian resources to contribute “in an equitable manner”.

+ s. 5.1: ...the Commission **shall** enhance the vitality of OLMCs and support and assist their development.

# Through What Means? Licensing

- CRTC still able to establish classes of licences and issue and amend licences: s. 9 (1)
    - But not for **online undertakings**
    - + term may be indefinite or fixed by the Commission (vs. up to 7 years)
    - But may no longer attach COLs “subject to such conditions related to the circumstances of the licensee as the CRTC deems appropriate”
    - Can still amend a licence on its own motion
    - + any time (vs after 5 years)...but not re term
- Query: what CRTC could amend if it no longer has COL-making power?*

# Through What Means? Licensing

CRTC retains discretion to **exempt**: s. 9(4)

But new s. 9(5) now requires it to review an exemption order “if it considers compliance with the order to have a significant effect on the implementation of the Canadian broadcasting policy” (vs. loose policy of reviewing every five years).

# Through What Means?

## s. 9.1 Orders

- Orders establishing Conditions replace COLs
- Like COLs, Orders to be “in furtherance of CRTC’s objects, as considered appropriate for the implementation of s. 3(1), but more “guidance” re what they could be.
- CRTC already establishes COLs (or regulations) in some of the identified areas (e.g., exhibition and expenditure obligations) or used to do so (genre exhibition)

# Through What Means?

## s. 9.1 Orders

- New: discoverability for VOD/social media; carriage requirements for online undertakings; BDU retail contract terms; accessibility
- + s. 9(1)(k) the proportion of programs to be broadcast that shall be original French language programs, while ensuring that these programs represent a significant proportion of Canadian programs
- But s. 9.1 (3.1): Only Orders re expenditures, discoverability and information provision can be made re user-uploaded programs to a social media service.

# Through What Means? Regulations

- Like with Orders, CRTC to make regulations “in furtherance of its objects”, but more “guidance” given

New include:

- CanCon def’n considerations (e.g., IP ownership; collaboration with indie producers); undue preference; registration

But s. 10(4): Only Regulations re registration and examining books of account can be made re user-uploaded programs to a social media service.

Through What Means? Regulations

CRTC to make regulations “in furtherance of its objects”, but more “guidance” given

considerations (e.g., IP ownership; collaboration with indie producers); undue preference;

regulations re registration and examining books of account can be made re user-uploaded programs to a social media service.

# To Accomplish What?

## s. 3(1) Broadcasting Policy Objectives

Same discretion to consider and balance sometimes competing interest as most objectives still worded as “should”, but more guidance re the matters to consider

# To Accomplish What?

## s. 3(1) Broadcasting Policy Objectives

s. 3(1)(d(iii): *The Canadian broadcasting system should... serve the needs and interests of all Canadians — including Canadians from racialized communities and Canadians of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages — and reflect their circumstances and aspirations, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples within that society*

+ more re French programming, community programming and serving OLMCs...and reinforced throughout





# Cabinet Discretion:

## s. 7 Policy Directions (s.7)

Maintained: Directions limited to “of general application on broad policy matters with respect to” any of the s. 3(1) broadcasting policy objectives or the s. 5(2) regulatory policy objectives, and can’t be made in respect of the issuance, amendment etc. of a particular licence.

# Cabinet Discretion

## s. 7 Policy Directions

- But new s. 7.1 “clarifies” that Policy Directions can be made with respect to
  - s. 9.1 CRTC Orders – which can be applicable to a specific person
  - s. 10(1) CRTC Regulations – which include re the definition of CanCon, exhibition, registration
  - s. 11.1(1) CRTC Regulations re expenditure obligations
  - s. 11.1 (2) CRTC Orders re expenditures to be made by a particular person
- Thus Cabinet will have new discretion to influence what used to be COLs + contract terms; accessibility

# Cabinet Discretion

## s. 10(1.1) Regulations

Cabinet will also have discretion to make regulations prescribing matters that the CRTC will be required to consider when making regulations defining CanCon per s. 10(1)(b)(v)

Thus Cabinet will have new discretion to make regulations re what CanCon regulations CRTC must make!

# C-10's "Grant of Discretion"

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